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12 April 1956

OGC HAS REVIEWED.

MEMORANDUM FOR: Chief, NEA

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ATTENTION :

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SUBJECT :

Applicability of Dual Compensation Statutes to
Proposed Contract with a Foreign Service Officer

1. You have consulted us as to whether the Agency could contract with a retired Foreign Service Officer for the rendition of certain services without putting him in jeopardy of violating the dual compensation statutes.

2. As we stated in a telephone conversation with [REDACTED] on Wednesday, 4 April 1956, we are unable to give you a definitive answer to your query, i.e., we are unable to guarantee that, under the proposed circumstances of the relationship, the gentleman in question would not be acting in violation of the dual compensation statutes if he were to retain both his Foreign Service annuity and his remittance under the contract.

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3. While there are various employment relationships to which these laws do not reach, the one most appropriate for consideration as regards your man was that of the independent contractor. Specifically, we had considered whether his proposed arrangement would fit the circumstances of the [REDACTED] case within this Agency, the circumstances of which the Comptroller General of the United States held not to fall within the proscription of the dual compensation statutes in a letter to the Director on 7 July 1955.

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4. In the third paragraph of that letter, the Comptroller General stated:

"In connection with the character of employment, the following facts appear. Your agency exercises no control or supervision over the performance of the work of the contractor; it provides no office space, facilities, tools, or appliances; there are no prescribed hours of work; and the individual in his discretion carries out the work at such times and under such circumstances as he deems expedient."

In connection with the prosecution of the work he may utilize the services of other persons as he sees fit and such persons are not subject to the supervision of your Agency. In short, the individual is told what information your Agency desires and is left to his own resources and devices to obtain that information."

In discussing the matter with us, you stated that you intended to exercise roughly the same control and supervision over your man as you would exercise over a staff or contract agent sent to the field on a similar mission. You stated that you might provide him with office space, a secretary and the other usual accoutrements of an office should it seem desirable from a cover standpoint to do. And you stated that, within security limitations, he would avail himself of the services of other Agency personnel in the area, which personnel are subject to the supervision of the Agency.

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5. In these specific respects, your proposed situation differs from that of [REDACTED]. The net of these differences, we think, can be fairly construed to indicate that your man's independence of action would be circumscribed, that he would be subject more or less to continuous control and supervision as opposed to being subject to mere guidance.

6. We discussed your situation informally in sterilized form with a representative of the Comptroller General's Office, the representative, in fact, who had done considerable work on the [REDACTED] case when it was presented to the Comptroller General. It was this representative's informal opinion that your plan of the utilization of your man would not fall foursquare within the circumstances of the [REDACTED] case. He thought that there were sufficient differences between the two as to raise substantial doubt as to the applicability of the [REDACTED] ruling.

7. We considered also the possibility of fitting your man under the ruling in the case of Brunswick v. U. S. (90 Court of Claims 258 (1940)). Here a Foreign Service Officer, retired for disability from the service, in a proceeding against the Comptroller General to recover annuity payments withheld, was allowed to retain both his retirement annuity and the compensation which simultaneously he received from successive, temporary federal positions. In the course of its opinion, the Court observed that:

"In the instant case, there is no question of 'double salary,' but only one salary and one annuity."

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"Retired pay does not constitute salary, but is in the nature of an annuity.

"There is no statutory provision against plaintiff receiving an annuity under the Foreign Service Act and being employed at the same time in a temporary position not under that act."

This language strongly indicates that no violation of the dual compensation statutes would be involved in your plans. However, we are informed by representatives of both the State Department and the General Accounting Office that the Comptroller General has not considered himself bound by the decision in the Brunswick case in subsequent, similar cases, and that he has taken the position that the Brunswick decision is applicable only to the particular facts then before the court. The practical effect of this attitude is that any retired Foreign Service Officer employed by the federal government would have his annuity payments suspended unless and until he could take his case to the Court of Claims on the theory of the Brunswick case and obtain a favorable decision. This would seem equally applicable to such a person who entered into a contract relationship with the federal government in view of (1) the limitations upon the Comptroller General's favorable ruling in the [redacted] case and (2) the informal opinion obtained from the GAO representative alluded to in paragraph 6 above.

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8. On the basis of the foregoing, we are unable to advise you that, in accepting a contract with this Agency and the payments thereunder and continuing to receive his annuity pay, your man would not be acting in violation of the dual compensation statutes as these are interpreted by the Comptroller General. There remains the possibility of a favorable ruling under the Brunswick doctrine. However, this is only a possibility and would require the time and expense incident to litigation.

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[redacted]
Office of General Counsel

OGC/HF:pkb

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